Supreme Court, U.S.
FILED
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No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

JOINT APPENDIX

RICHARD L. HORSTMAN
Marathon Oil Company
7301 NW Expressway
Oklahoma City, OK 73132

REX E. LEE
CARTER G. PHILLIPS *
JANET M. LETSON
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

G. DAVID BRUMFIELD *
Suite 613, 405 Capitol Street
Charleston, WV 25301
(304) 346-9333

WADE T. WATSON
DAVID L. WHITE
SANDERS, WATSON & WHITE
620 Law & Commerce Building
Bluefield, WV 24701
(304) 327-5106
Counsel for Respondents

* Counsel of Record

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 17, 1992
CERTIORARI GRANTED NOVEMBER 30, 1992

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RELEVANT DOCKET ENTRIES

IN THE CIRCUIT COURT
OF McDOWELL COUNTY, WEST VIRGINIA

Civil Action Number 85-C-550

TXO PRODUCTION CORP, A Delaware Corporation licensed to do business in West Virginia; AMERICAN PETROFINA COMPANY OF TEXAS, a corporation; FINADEL, INC. APCOT-FINADEL GENERAL PARTNERSHIP, a Texas general partnership; and APCOT-FINADEL JOINT VENTURE, a general partnership, *Plaintiffs,*

vs.

ALLIANCE RESOURCES CORP., a Texas corporation licensed to do business in West Virginia; TUG FORK LAND COMPANY, a West Virginia corporation; GEORGE KING, an individual; and GROVER C. GOODE, an individual,
Defendants.

DATE	PROCEEDINGS
8/23/85	Complaint filed. Summons issued. 30 days Secretary of State. 30 days personal.
8/29/85	Summons filed. Accepted Service by Secretary of State as to Tug Fork Land Company 8-26-85.
8/29/85	Summons filed. Accepted Service by Secretary of State as to Alliance Resources Corporation 8-26-85.
9/3/85	Summons filed. Executed as to Grover C. Goode 8-27-85.
9/3/85	Summons filed. Executed as to George King 8-26-85.
9/25/85	Stipulation filed.

DATE	PROCEEDINGS
9/25/85	Answer to Complaint for Declaratory Judgment on behalf of Tug Fork Land Company filed.
9/25/85	Original and copy of Answer of Defendants, George King and Grover C. Goode filed.
10/16/85	Motion to Dismiss filed.
10/22/85	Answer of Alliance Resources Corporation filed.
10/25/85	Motion and Notice filed.
10/29/85	Notice and Motion to Dismiss filed.
11/4/85	Response to Motion to Dismiss Filed by Defendant, Alliance Resources Corporation filed.
11/4/85	Affidavit filed.
11/12/85	Motion to Dismiss filed.
12/5/85	Request for Admissions filed.
1/13/86	Response to Request for Admissions filed.
2/13/86	1 Subpoena on behalf of the plaintiff.
2/19/86	Notice of Deposition filed.
2/19/86	Motion for Summary and/or Declaratory Judgment filed.
2/21/86	Notice of Deposition filed.
3/13/86	Interrogatory filed.
3/20/86	Order filed. Attested copies issued.
3/24/86	Plaintiff's Answer to Interrogatory of Defendant, Tug Fork Land Company filed.
4/15/86	Deposition of Lillian Wilson, Ph. D. filed.
4/16/86	Amended Complaint filed.
4/25/86	Answer of Alliance Resources Corporation to the Amended Complaint filed.
4/28/86	Answer of Tug Fork Land Company to Amended Complaint filed.

DATE	PROCEEDINGS
5/1/86	Answer of Defendants, George King and Grover C. Goode, to the Amended Complaint filed.
5/8/86	Motion to Dismiss and Reply to Counterclaim of Tug Fork Land Company filed.
5/8/86	Motion to Dismiss and Reply to Counterclaim of Alliance Resources Corporation filed.
5/8/86	Motion to Dismiss and Reply to Counterclaim of George King and Grover C. Goode filed.
5/14/86	Order for a non-jury trial filed.
6/19/86	Request of Defendant, Alliance Resources Corp., to Plaintiffs for Production of Documents filed.
7/16/86	Plaintiffs' Interrogatories to Defendant Alliance Resources Corp. filed.
7/16/86	Request for Production and Copying of Documents filed.
7/16/86	Request for Production and Copying of Documents filed.
7/16/86	Request for Production and Copying of Documents filed.
7/16/86	Plaintiffs' Interrogatories to Defendants George King and Grover C. Goode filed.
7/16/86	Plaintiffs' Interrogatories to Defendant Tug Fork Land Company filed.
7/30/86	Notice and Motion Under Rule 37(a) filed.
10/15/86	Request for Admissions filed.
11/7/86	Answer to Plaintiffs' Interrogatories by Defendant, Alliance Resources Corp. filed.
11/7/86	Response of Defendant, Alliance Resources Corp., to Plaintiffs' Request for Production and Copying of Documents filed.

DATE	PROCEEDINGS
11/7/86	Response of Defendant, Alliance Resources Corp., to Plaintiffs' Request for Admissions filed.
11/7/86	First Set of Interrogatories and Second Request of Defendant, Alliance Resources Corp., to Plaintiffs for Production of Documents filed.
11/10/86	Answer to Request for Admissions filed.
12/1/86	Partial Response to Motion to Produce Documents filed.
1/2/87	Answer to Plaintiffs' Interrogatories by Defendants, George King and Grover C. Goode filed.
1/7/87	Answers to Request for Admissions filed.
1/22/87	Motion to Compel filed.
2/3/87	Plaintiffs' Response to Motion to Compel filed.
2/25/87	Order filed. Attested copies issued.
3/31/87	Request of Defendant, Alliance Resources Corp. to Plaintiffs for Production of Documents Third Set filed.
4/6/87	Affidavit from Douglas Black filed.
4/7/87	Plaintiffs' Trial Memorandum filed. (Pages were substituted as directed in letter)
5/8/87	Affidavit of Houston Welch filed.
5/26/87	Defendant, Alliance Resources Corporation Second Set of Interrogatories and Fourth Request for Production of Documents to Plaintiffs filed.
6/12/87	Defendant Alliance Resources Corp.'s Memorandum of Law and Note of Argument with Respect to the Issues Raised in the Plaintiffs' Amended Complaint filed.
6/15/87	Defendant Tug Ford (sic) Land Company's Memorandum of Law with Respect to the Issues Raised by the Complaint filed.

DATE	PROCEEDINGS
6/26/87	Motion filed.
6/26/87	Plaintiffs' Response to Defendant, Alliance Resources Corporation Second Set of Interrogatories and Fourth Request for Production of Documents to Plaintiff filed.
6/29/87	Motion of Defendant, Alliance Resources Corporation, to Compel Plaintiffs to Respond to Discovery filed.
8/3/87	Plaintiffs' Response to Defendant, Alliance Resources Corporation Second Set of Interrogatories and Fourth Request for Production of Documents filed.
9/30/87	Order setting case for non-jury trial filed.
12/7/87	Motion In Limine to Prevent Plaintiffs From Using Expert and Extrinsic Evidence filed.
12/7/87	Tug Fork Land Company's Answers to Plaintiffs' Interrogatories filed.
12/17/87	Response to Defendants' Motion in Limine to Prevent Testimony of Expert Witnesses filed.
3/11/88	Order filed.
3/14/88	Motion to Prepare Transcript filed.
3/14/88	Order to Prepare Transcript filed. Attested copy issued.
3/23/88	Original and copy of transcript filed.
12/9/88	Third Set of Interrogatories of Defendant Alliance Resources Corp., to Plaintiff, TXO Production Corp. filed.
12/9/88	Interrogatories of Defendant, Alliance Resources Corp. to Plaintiffs, American Petrofina Company of Texas, a Corporation, Finadel, Inc., a Corporation, Apcot-Finandel (sic) General Partnership and Apcot-Finadel Joint Venture filed.

DATE	PROCEEDINGS
1/20/89	Answers to Third Set of Interrogatories of Defendant Alliance Resources Corp. to Plaintiff, TXO Production Corp. filed.
1/20/89	Answers to Interrogatories Of Defendant, Alliance Resources Corp. To Plaintiffs, American Petrofina Company of Texas, A Corporation, Finadel, Inc., A Corporation, Apcot-Finadel General Partnership and Apcot-Finadel Joint Venture filed.
1/30/89	Stipulation filed.
2/23/89	Motion of Defendants to Substitute Parties filed.
2/23/89	Interrogatories and Motion to Produce of Defendant, Alliance Resources Corp. to Plaintiff, TXO Production Corp. 4th Set filed.
3/27/89	Stipulation filed.
4/3/89	Order Filed.
4/11/89	Plaintiff TXO Production Corp's Ansers (sic) To Interrogatories And Motion To Produce Of Defendant, Alliance Resources Corp. 4th Set.
8/15/89	Motion to Compel Answers to Interrogatories and Response to Request for Production of Documents filed.
8/31/89	Order continuing case filed. Attested copies issued.
10/16/89	Order Filed. Attested copies mailed to all counsel.
11/13/89	Plaintiff TXO Production Corp's Supplemental Answers To Interrogatories and Motion to Produce of Defendant, Alliance Resources Corp. Third Set filed.
1/23/90	Supplemental Responses to Interrogatories filed.
2/26/90	Supplemental Interrogatories filed.
2/26/90	Request for Admissions filed.

DATE	PROCEEDINGS
4/30/90	Plaintiffs' Memorandum in Support of Motion to Dismiss Slander of Title Counterclaim Or In The Alternative to Dismiss it as to all Plaintiffs Except TXO Production Corp. filed.
4/30/90	Notice filed.
4/30/90	Motion to Dismiss Slander of Title Counterclaim Or In The Alternative to Dismiss It As to all Plaintiffs Except TXO Production Corp. filed.
4/30/90	Notice filed.
4/30/90	Motion filed.
4/30/90	Notice filed.
4/30/90	Motion filed.
4/30/90	Motion to Dismiss and Amended Reply to Counterclaim filed.
5/10/90	Answer of Defendant, Alliance Resources Corp. to Plaintiffs' Supplemental Interrogatories filed.
5/15/90	Defendant Tug Fork Land Company's Reply Memorandum To Plaintiffs' Memorandum In Support Of Motion To Dismiss Slander Of Title Counterclaim Or In The Alternative To Dismiss It As To All Plaintiffs Except TXO Production Corp. filed.
5/18/90	Copy of letter filed.
5/18/90	Response to Request for Admissions filed.
5/18/90	Order setting case for trial filed.
5/29/90	Plaintiffs' Reply to Defendant Tug Fork's Answering Brief of Authorities filed.
5/30/90	Memorandum in Response to Plaintiffs' Reply Brief of May 25, 1990 Filed on Behalf of All Defendants filed.
6/6/90	Notice of Depositions filed.

DATE	PROCEEDINGS
6/6/90	5 Subpoenas on behalf of defendant, Alliance Resources Corp.
6/6/90	4 Notices of Deposition filed.
6/15/90	Deposition of James P. Pruitt filed.
6/15/90	Plaintiffs Trial Memorandum filed.
6/15/90	Plaintiffs' Motion in Limine to Exclude Deposition Testimony Offered by Defendants filed.
6/15/90	[Plaintiffs' Memorandum] Special Damages Is An Essential Element of a Slander Of Title Action. Absent a Particular Lost Transaction, No Cause of Action Exists and Attorney Fees Are Not Recoverable filed.
6/15/90	[Plaintiffs' Memorandum] Malice Is An Essential Element To A Slander of Title Action. Good Faith In Asserting a Property Interest Is A Complete Defense. A Party Who Acts Upon Advice of Counsel is not Liable in Damages For Slander of Title filed.
6/15/90	[Plaintiffs' Memorandum] Actual Malice is a Prerequisite To Pumitive (sic) Damages in a Slander of Title Action. Actual Malice is Different From the Malice Needed to Sustain Actual Damages. A Person Who Relies On the Advice of Counsel Is Not Liable in Punitive Damages filed.
6/18/90	Order begining (sic) trial of case filed.
6/18/90	Order allowing Timonty (sic) M. Miller leave to appear as counsel for the Plaintiffs filed.
6/18/90	Order Denying Summary Judgment filed.
6/18/90	Memorandum of Law on The Elements of Slander of Title filed.
6/18/90	Memorandum of Law on the Admissibility of Evidence of Other Acts Under 404(b) Of the Rules of Evidence filed.

DATE	PROCEEDINGS
6/18/90	Admissibility of Deposition Evidence of Attorneys Who Have Represented Parties in Litigation Against TXO And Its Subsidiaries filed.
6/18/90	Defendant Tug Fork Land Company's Memorandum Of Law Concerning Opinion Evidence Under Rule 701 and 702 West Virginia Rules of Evidence filed.
6/18/90	Order adjourning trial of case filed.
6/21/90	Order resuming trial of case filed.
6/21/90	Order adjourning trial of case filed.
6/22/90	Order resuming trial of case filed.
6/18/90	Deposition of R. H. Madden, III filed.
6/18/90	Deposition of Mr. Clarence Harrison, Jr. filed.
6/18/90	Deposition of Allan Devore filed.
6/18/90	Deposition of D. Michael Good filed.
6/22/90	Deposition of James P. Pruitt filed.
6/22/90	Deposition of Robert Wallace filed.
6/29/90	Judgment on Jury Verdict filed.
7/6/90	TXO's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for a New Trial filed.
7/31/90	Defendants' Motion to Compel Surety of Bond filed.
8/24/90	Order setting hearing on motions filed. Attested copies mailed to Wade T. Watson, G. David Brumfield, Grover C. Goode, Timothy M. Miller.
9/14/90	Alternative Motion of TXO Production Corp. For Stay Of Enforcement of Judgment Pending Appeal filed.
9/14/90	Notice of Motion filed.

DATE	PROCEEDINGS
9/18/90	TXO's Memorandum of Law in Support of its Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for a New Trial, and in the Second Alternative Motion for Remittur (sic) filed.
9/20/90	Plaintiff's Motion for Preparation of Transcript filed.
9/20/90	Order to Prepare Transcript filed. Attested copies issued.
9/28/90	Order denying motion filed.
10/22/90	Supersedeas Bond executed.
10/29/90	Petitoner's Designation of the Record for Appeal filed.
12/11/90	Certification filed.
12/11/90	Original and copy of Transcript filed.
12/27/90	Stipulation filed.
12/27/90	Supplemental Supersedeas Bond filed.
1/9/91	Motion for Extension of Appeal Period filed.
1/9/91	Agreed Order Extending Appeal Period filed.
3/26/91	Original and seven copies of petition for appeal filed.
7/12/91	Order from the Supreme Court of appeal granting appeal filed.
7/19/91	Bond Executed. ($50.00 Cash received from Robinson & McElwee) Attested copy of bond mailed to Supreme Court of Appeals.
7/23/91	Second Supplemental Supersedeas Bond filed.
7/29/91	Petitioner's Designation of the Record for Appeal filed.

DATE	PROCEEDINGS
8/9/91	Designation of Record for Appeal on Behalf of Alliance Resources Corp., Tug Fork Land Company; George King; and Grover C. Goode filed.
1/24/92	Third Supplemental Supersedeas Bond filed.
5/15/92	Syllabus by the Court filed.
6/26/92	Order from Supreme Court of Appeals filed.
7/24/92	Fourth Supplemental Supersedeas Bond filed.
7/24/92	Copy of McHugh, Chief Justice, concurring filed.
12/11/92	Correspondence from Supreme Court of Appeals filed.

IN THE CIRCUIT COURT
OF McDOWELL COUNTY, WEST VIRGINIA

Civil Action Number 85-C-550

TXO PRODUCTION CORP, A Delaware Corporation licensed to do business in West Virginia; AMERICAN PETROFINA COMPANY OF TEXAS, a corporation; FINADEL, INC. APCO-FINADEL (sic) GENERAL PARTNERSHIP, a Texas general partnership; and APCOT-FINADEL JOINT VENTURE, a general partnership, *Plaintiffs*

vs.

ALLIANCE RESOURCES CORP., a Texas corporation licensed to do business in West Virginia; TUG FORK LAND COMPANY, a West Virginia corporation; GEORGE KING, an individual; and GROVER C. GOODE, an individual,
Defendants

ORDER

The above-styled matter came on for trial before this court without a jury on December 17, 1987. All parties by their counsel announced ready and the Court requested if there were any preliminary matters to be taken up prior to the taking of evidence on the merits.

The defendant Tug Fork Land Company move the Court *in limine* to prohibit plaintiffs from introducing expert and extrinsic evidence, concerning the construction and the interpretation of the deeds or instruments of title in issue in this case, and particularly the deed from Tug Fork Land Company to Leo J. Signaigo, Jr., dated the 2nd day of September, 1958 which is more fully set out in the defendants written motion in limine filed in this court and made a part of this case.

The Court after reviewing the pleadings, exhibits, motion, memorandum in Support of said motion, the Response to Defendant's motion, and argument of counsel for the respective parties is of the opinion that said motion in limine should be granted and it is so ORDERED. After which ruling the plaintiffs by counsel indicated that they would not proceed on the merits due to the Courts ruling on said motion.

In accordance with said ruling, the Court states that it considered all of the pleadings, exhibits, motion, and briefs in support thereof and opposition thereto, oral arguments made by counsel before the Court and any evidence and exhibits admitted into evidence at said hearing all considered as part of the evidence in this case. The Court makes the following Findings of Facts and Conclusions of Law.

FINDINGS OF FACT

1. This matter is before the Court on plaintiff's Complaint for Declaratory Judgment to determine the ownership of oil and gas underlying 1,002.74 acres on upper Hensley Branch, Browns Creek District, McDowell County, West Virginia, which is described in three separate parcels in that certain deed from Tug Fork Land Company to Leo J. Signaigo, Jr., dated September 2, 1958, of record in the office of the Clerk of the County Commission of McDowell County, West Virginia, in Deed Book 238, at page 562. Parcel Number 1 describes a 7.64 acre tract. Parcel Number 2 describes a 445 acre tract. Parcel Number 3 describes a 547.7 acre tract. All of the tracts were obtained in fee by Tug Fork Land Company from Roderfield Realty by deed dated May 16, 1958.

2. Although defendants have asserted a counterclaim, the only matter now before the Court, both parties having waived a jury trial, is the plaintiff's request for a declaratory judgment as to whether there is ambiguity in

the above deed and subsequent deeds attached as exhibits to the complaint as to the oil and gas ownership, the Court's determination of such ownership and whether, in view of the Court's determination, the quit claim deed obtained by plaintiff is of any force or effect, and if so, whether plaintiff is under a fiduciary duty to transfer such title to Tug Fork and if so, whether plaintiff is entitled to be reimbursed for its expenses in clearing title by Alliance through the warranty clause in the assignment of the oil and gas lease from Tug Fork.

3. The plaintiffs contend that there is a cloud on the title to the oil and gas underlying the 1,002.74 acre tract, because of what they allege is an ambiguity in the deed of September 2, 1958 from Tug Fork Land Company to Leo J. Signaigo, Jr. and the failure of Tug Fork Land Company to have itself assessed and to pay real estate taxes upon such oil and gas interest. According to plaintiffs contention the deed is ambiguous and it is possible the granting clause in the deed conveys the oil and gas to Signaigo inasmuch as it granted "all the coal and other minerals and mineral substances in, on and underlying the . . . . tracts or parcels of land" and inasmuch as the later limiting clause in the deed may only act to reserve the oil and gas in the Pocahontas #3 and #4 seams (the coal bed gas) and not the oil and gas in any other formation. The exception and reservation is as follows:

> 2. There is excepted and reserved from the operation of this deed:
>
> (a) All the oil and gas and all the coal in the Pocahontas No. 3 and 4 seams in said three tracts of land above described.

In a later paragraph in the deed, the reservations and exceptions relating to the oil and gas are further elaborated upon as follows:

> 6. It is understood and agreed that there is excepted and reserved to the party of the party of the first part, its successors, assigns and lessees, the right to mine and remove all of said No. 3 and No. 4 Pocahontas seams of coal, together with the right to bore for and remove all the oil and gas underlying said tracts, such rights, however, to be used in common with the party of the second part and so as to interfere as little as possible with the mining operations of the party of the second part.

4. Plaintiff, TXO Production Corporation, claims title to the oil and gas underlying said tracts by virtue of a quit claim deed it obtained from Virginia Crews Coal Company dated May 7, 1985, wherein Virginia Crews purported to convey "all of its right, title and interest in and to the oil and gas underlying the tracts." Although Virginia Crews Coal Company would only give a quit claim deed for the consideration of $6,000.00 to cover any interest it might have acquired to the oil and gas underlying the tracts, there is no question that Virginia Crews Coal Company did own all of the coal underlying the tracts, except Pocahontas No. 3 and 4 seam, by virtue of having obtained title to that mineral interest from Hawley Coal Mining Corporation, by deed dated July 21, 1983. Hawley Coal Mining Corporation obtained title to the minerals, subject to the reservations in the deed from Tug Fork Land Company to Leo J. Signaigo, Jr. of September 2, 1958, from Leo J. Signaigo, Jr., who had conveyed it to Empire Coal and Land Corporation by deed dated April 11, 1961, and Empire Coal and Land Corporation merged into Hawley Coal Mining Corporation by certificate of merger dated December 31, 1969.

5. Defendant, Tug Fork Land Company, claims that it reserved all the oil and gas underlying the tracts of land conveyed to Leo J. Signaigo, Jr. by deed dated September 2, 1958, and that on September 1, 1984, Tug Fork Land Company leased the oil and gas to George King, who assigned said lease to Alliance Resources Corporation on February 25, 1985, reserving a 1/16th overrid-

ing royalty in the oil and gas produced under the assigned lease. George King then assigned one-half of his one-sixteenth overriding royalty to Grover C. Goode. On April 2, 1985, Alliance Resources assigned the said Tug Fork lease to TXO Production Corp., with two other leases, for the sum of $31,794.80.

6. Upon the specific request of plaintiffs' counsel, the Court further finds based upon plaintiffs' Request for Admissions directed to defendants and defendants responses thereto, that subsequent to the Tug Fork to Signaigo deed, and up until the time of plaintiff's filing of this declaratory judgment action, Tug Fork Land Company, although claiming title to all of the oil and gas under the realty in question, was not listed in the McDowell County Land Books as owning such oil and gas and had not been paying taxes therefore.

CONCLUSIONS OF LAW

1. A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation, but will be applied and enforced according to such intent. *Sally-Mike Properties v. Yokum*, 332 S.E.2d 597 (W.Va. 1985); *Cotiga Development Company v. United Fuel Gas Company*, 147 W.Va. 484, 128 S.E.2d 626 (1962); *Davis v. Hardman*, 1 W.Va. 82, 133 S.E.2d 77 (1963); *Tate v. United Fuel Gas Company*, 137 W.Va. 272, 71 S.E.2d 65 (1952).

2. In construing a deed, the function of the court is to ascertain the intent of the parties as expressed in the language used by them. All rules of construction must yield to the expressed intention of the parties if that can be ascertained. *Davis v. Hardman*, 148 W. Va. 82, 133 S.E.2d 77 (1963).

3. The fundamental principle in interpreting deeds is that the intention of the parties, if ascertainable, pre-

vails, and, as a general rule, it is necessary to consider the entire instrument as a whole in order to ascertain that intent. Where the intent of the parties is clearly expressed in definite and unambiguous language on the face of the deed itself, the court is required to give effect to such language and, ordinarily, will not resort to parol or extrinsic evidence. *Pochahontas Land Corp. vs. Evans*, 332 S.E.2d 604 (W. Va. 1985). Thus, in the instant case, the court, finding that the intention of the parties is clearly expressed in the language of the deed, is of the opinion and does find that it is unnecessary to resort to parol or extrinsic evidence.

4. The construction of the words of a deed is a matter of law for the court to decide, and is not a subject for the introduction by the parties of opinion evidence thereon. Thus, the Court considers the motion in limine filed by defendant Tug Fork Land Company, to exclude expert and extrinsic evidence, well taken and grants said motion to prohibit plaintiffs from introducing expert evidence on matter of law, such as the construction of the deeds herein. *Berkeley Public Service District v. Vitro Corp.*, —— W. Va. ——, 162 S.E.2d 189 (1968). See also *Marx & Co. v. Diners Club, Inc.*, 550 F.2d 505 (2d Cir. 1977); and *Adalman v. Baker, Watts & Co.*, 807 F.2d 359 (1986 4th Cir.).

5. The Court finds, as a matter of law, that there is no ambiguity in the above deed reservations, and that Tug Fork Land Company intended, by the language used in Paragraphs 2(a) and 6, to reserve the coal in the Pocahontas No. 3 and 4 seams, and all of the oil and gas underlying the 1,002.74 acres, described in the three tracts, in its deed of September 2, 1958 to Leo J. Signaigo, Jr. Therefore, Tug Fork Land Company retained title to the oil and gas and leased it to George King, who, in turn, assigned it to Alliance Resources, which, in turn, assigned said lease to TXO Production Corp. as explained above.

6. The Court further finds, as a matter of law, that TXO Production Corp. obtained no interest or title to the oil and gas underlying the 1,002.74 acres in question from Virginia Crews Coal Company by reason of the quit claim deed in question. The quit claim deed of Virginia Crews Coal Company conveyed no title to TXO Production Corp. because Virginia Crews Coal Company obtained no title to the oil and gas from Hawley Coal Mining Corporation and said quit claim deed is, therefore, a nullity.

7. The Court, although denying plaintiff's motion that its Request for Admissions and defendants' responses thereto be admitted in evidence and the Court only considering the same as being proffered, finds, as a conclusion of law, that the failure of Tug Fork Land Company to have itself listed and assessed in the appropriate McDowell County Land Books and to pay real estate taxes for its oil and gas interest under the realty in question, when considered either separately or in conjunction with the alleged ambiguity of the Tug Fork to Signaigo deed, did not create any cloud on Tug Fork's title to such oil and gas nor did it contribute to any ambiguity in the Tug Fork to Signaigo deed which might justify TXO in taking curative action to clear such cloud on title or in bringing this declaratory judgment action for such purpose.

8. The Court further finds and orders that by reason of the Court's findings and orders the plaintiff is not entitled to recover any of its costs and expenses, including, but not limited to, the $6,000.00 paid to Virginia Crews Coal Company for the quit claim deed in question.

It is further ORDERED that the Clerk transmit a copy of this Order to the Clerk of the County Commission of McDowell County, West Virginia, and that the said Order be filed in the public records of the office of the said Clerk of the County Commission, showing that the quit claim deed from Virginia Crews Coal Company,

dated May 7, 1985, to TXO Production Corp., of record in the office of the Clerk of the County Commission, in Deed Book 380, at Page 180, is hereby ADJUDGED and DECREED to be void and of no effect, thereby removing any cloud on the title to the oil and gas rights of Tug Fork Land Company, its successors in title, lessees and assignees.

Plaintiff objects and excepts to the Court's findings and rulings and moves the Court for permission to immediately appeal the Court's rulings, which motion is granted. Plaintiff is, therefore, granted a stay of execution of this judgment for a period of sixty (60) days from the date of entry of this Order in which plaintiff may petition the West Virginia Supreme Court of Appeals for an appeal of the Court's ruling, and should such petition be filed within this sitxy (60) day stay of execution, this stay of execution of judgment shall be automatically extended until the Supreme Court of Appeals has ruled thereon.

The Clerk is directed to forward a copy of this Order to all Counsel of record.

This case is, therefore, continued as to defendants' counterclaim for further discovery and to be brought on under the Rules of Civil procedure.

/s/ Booker T. Stephens
Judge

EXCERPTS FROM RULINGS ON INSTRUCTIONS AND INSTRUCTIONS AS GIVEN TO THE JURY DATED MAY 22, 1990

* * * *

[719] Thereupon the Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 were received into evidence, the same being in the custody of the Circuit Clerk.

THE COURT: Did you renew your motions?

MR. MILLER: Yes. Secondly, I would like to renew at this time all of the motions for a directed verdict made by plaintiff TXO at the close of the defendant's case in chief.

THE COURT: Those will all be denied and overruled.

MR. MILLER: Your Honor, if I could add one more. As a basis for my motion of directed verdict, we move that there could be no slander of title because title was in the State of West Virginia and not Tug Fork Land Company at the time of the taking of the quit claim deed.

THE COURT: All right. That will be denied and overruled.

Now, there's a Defendant's Exhibit 27, which is an inter-office memo dated July 15th, 1985, which is admitted in by stipulation and agreement of counsel. That's Defendant's Exhibit No. 27.

Do you have your instructions? I'm ready to rule.

Let me tell you the changes I'm making in the charge. Under 4 on page 2, on the second line, I have stricken the word complaint and inserted the word counterclaim and on the third line I have stricken the word plaintiff and inserted the word defendants at the beginning of that third sentence. At the end [720] of the same sentence, I have stricken the word defendant and inserted the word plaintiff. On the third page at what is identified as No. 7, I have stricken the word his and inserted the word their.

On the very last page of the charge, the first paragraph that begins with the words, the same rules, in the second line, I have stricken the word past before damages and I have stricken the following paragraph in its entirety. Otherwise, I will give the charge as is. Are there any objections to it?

MR. MILLER: No objection.

THE COURT: Mr. Watson or Brumfield?

MR. WATSON: No objection.

THE COURT: All right. Defendant's Instruction No. 1? It will be given.

Do you have any objection, Mr. Miller?

MR. MILLER: No objection.

DEFENDANT'S INSTRUCTION NO. 1

In this case the defendants, Alliance Resources, Tug Fork, George King and Grover Goode seek damages against TXO Production Corporation, a Delaware Corporation licensed to do business in West Virginia. In cases of this type where damages are sought, it is commonly the party designated as the plaintiff who seeks an award of damages against a party designated as the defendant. In this case, however, the defendants seek an award of damages [721] against the plaintiff on their counterclaim against the plaintiff, TXO.

The law permits an award of money damages to the defendants under these circumstances if you find from the evidence in the case and the law as I instruct you that the defendants are entitled to your verdict.

For purposes of clarity, in the instructions I will give you in this case, I will refer to all of the defendants, Alliance Resources, Tug Fork, George King and Grover Goode, collectively simply as the defendants. I will refer to plaintiff TXO Production Corporation as the plaintiff, or simply as TXO.

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: Defendant's Instruction No. 2 will be given. Do you have any objection?

MR. MILLER: Your Honor, I have an objection. In the second full paragraph of No. 2, I don't have an objection to the second phrase after the comma indicated, is bound by facts admitted by its attorney in the course of litigation. I don't have an objection to that. I do have an objection to the first part where it says a corporation is likewise bound by the acts of an attorney retained by such corporation to handle its affairs. On the basis of our defense of reliance upon the advice of outside counsel, a distinction with outside or inside, I believe the [722] statement is correct as it relates to the internal counsel, who are the direct employees of TXO, but I believe we do have a defense of good faith in reliance upon the advice of outside counsel.

THE COURT: All right.

MR. WATSON: I think everything that the outside counsel did was also approved by inhouse counsel.

THE COURT: I'll give it over your objection as is.

DEFENDANT'S INSTRUCTION NO. 2

Since a corporation can act only through its officers, agents or employees, an act of an officer, employee or other agent of a corporation performed in the course of his or her duties on behalf of the corporation is held in law to be the act of the corporation itself. Therefore, a corporation is liable for the acts or omissions of its officers or employees or other agents if the act was performed in the course of their corporate duties.

A corporation is likewise bound by the acts of an attorney retained by such corporation to handle its affairs, and is bound by facts admitted by its attorney in the course of litigation.

Chesapeake & Ohio System Federation v. Hash, 294 S.E.2d 296 (W.Va. 1982)

Lisk v. Criswell, 52 Bankr. 184 (Bankr. E.D. Va. 1985)

2A M.J. Attorney and Client, §§ 17, 19;

18B Am. Jur.2d Corporations, § 1663.

OBJECTION—GIVEN—EXCEPTION

/s/ Booker T. Stephens, Judge

[723] THE COURT: Did you withdraw a No. 3 or not offer it? I go to 4 on yours now. I don't have a No. 3.

MR. BRUMFIELD: Here is 3.

THE COURT: I'll give 3. Do you have an objection? This is one of their primary theories of the case. Do you have an objection?

MR. MILLER: Right, Your Honor. We'd state our objection for many of the reasons we've stated before as to an incorrect statement of the law as to a statement of the essential elements of a slander in title action and with respect to the special damages issue and malice, we believe those are also needed to be essential elements.

THE COURT: All right.

DEFENDANT'S INSTRUCTION NO. 3

The defendants in this case seek an award of money damages against TXO Production Corp. for slander of title to their property interests. Therefore, if you find that the defendants had a legally protected interest—such as ownership, lease or assignment—in the natural gas underlying the Blevins tract, and if you further find that TXO Production Corp., through its agents and employees, caused a quit claim deed to be recorded in the McDowell County court house conveying the said oil and gas to TXO Production Corp., with the intention to re-

duce the value of the defendants' property interest, or which TXO Production [724] Corp. recognized or should have recognized would reduce the value of defendants' property interest; and if you further find that TXO Production Corp. knew that the quit claim deed was false, or acted in reckless disregard of its truth or falsity, and that it was foreseeable that others would rely on said quit claim deed, and if you further find that defendants have suffered damages as a result of the said acts of TXO Production Corp., then the defendants have proved slander of title against TXO Production Corp. and are entitled to a verdict against TXO Production Corp.

OBJECTION—GIVEN—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: No. 4, Defendant's No. 4, is verbatim from my charge. Do you wish to withdraw it or just for me to refuse it?

MR. WATSON: We'll withdraw it, Your Honor.

THE COURT: I'm giving No. 5. Do you have any objection, Mr. Miller?

MR. MILLER: Your Honor, we have no objection to it other than as I stated before we believe that special damage will be required a compensatory damage award in this case.

MR. WATSON: Your Honor, we offered Defendant's Instruction No. 5 on that compensatory damage. We think your charge probably covers that, anyway, and so we'll withdraw No. 5.

THE COURT: All right. No. 5 is withdrawn.

[725] THE COURT: No. 6?

MR. MILLER: We object to the instruction on the basis that the evidence did not justify the giving of punitive damages instruction and we don't believe it should be submitted to the jury.

THE COURT: I've heard the evidence in this case and I am of the opinion that punitive damages will go to

the jury in this case and it will be so ordered. So the issue of punitive damages will go to the jury.

DEFENDANT'S INSTRUCTION NO. 6

In actions of tort, where gross fraud, malice, oppression or wanton, wilful or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive or vindictive damages.

Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895).

Wells v. Smith, 297 S.E.2d 872 (W.Va. 1982).

Smith v. Perry, 359 S.E.2d 624 (W.Va. 1987).

OBJECTION—GIVEN—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: All right. To recapitulate on the Defendant's Instructions, I'm going to give No. 1, No. 2, No. 3, and No. 6.

Now we can go to the plaintiff's instructions.

Plaintiff's Instruction No. 1.

MR. BRUMFIELD: No objection.

[726] PLAINTIFF'S INSTRUCTION No. 1

TXO has raised as a defense in this action that they acted in good faith and on the reliance of the advice of their attorneys that there existed a problem with the title to the property and that a quit claim should be obtained and a declaratory judgment action filed in order to clear the alleged title problem. If you believe from the evidence as a whole that the plaintiff TXO acted in good faith and in reliance upon the advice of their attorneys, then TXO cannot, as a matter of law, be liable to the defendants and you should render your verdict for the

plaintiff TXO and against the defendants.

Hurwitz v. Lotz, 172 La. 27, 133 So. 351 (1931); Noble v. Johnson, 180 Ok. 169, 68 P.2d 838 (1937).

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: No. 2?
MR. BRUMFIELD: No objection.

PLAINTIFF'S INSTRUCTION NO. 2

For you to render any judgment in favor of the defendants in this case, you must be satisfied by a preponderance of the evidence that the defendants have proven that the plaintiff TXO acted maliciously and without good faith in obtaining and recording the quit claim deed from Virginia Crews Coal Company.

In carrying this burden of proof the defendants must show [727] that TXO filed the quit claim deed with the intent to hurt the interest of the defendants, in other words "ill will."

Accordingly, unless you find that the defendants have proven by a preponderance of the evidence that TXO acted maliciously and without good faith and recorded the quit claim deed with an intent to hurt the defendants rather than to clear up the title, then you should render a verdict for the plaintiff TXO and against the defendants.

Cardon v. McConnell, 120 N.C. 461, 27 S.E. 109 (1897); Noble v. Johnson, 180 Okla. 169, 68 P.2d 838 (1937); Hurwitz v. Lotz, 172 La. 27, 133 So. 351 (1931); Allison v. Berry, 316 Ill. App. 261, 44 N.E.2d 934, 929 (1937); Briggs v. Coykendall, 57 N.D. 785, 224 N.W. 202 (1929).

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: No. 3?
MR. BRUMFIELD: We object.
THE COURT: Will be refused.

PLAINTIFF'S INSTRUCTION NO. 3

For each of the defendants to prevail in this case they must each prove, as one element of their action, they suffered special damage as a result of the alleged wrongful and malicious recording of a quit claim deed.

To suffer "special damages" means that each defendant must show that they suffered a particular loss, such as, a prospective purchaser of any lease or property interest they may have had in [728] the property. It is not sufficient for the defendants to merely offer proof that the lease may have been worth more per acre or that they intended or considered selling to another person who might buy. They must prove by a preponderance of the evidence that there was a loss of a particular sale to a particular person and that that sale did not go forward as a direct and proximate result of the alleged wrongful acts by the plaintiff. The damage must be as a result of the slander of title and not other factors to be recoverable.

Accordingly, unless you find by a preponderance of the evidence that a defendant has proven that they suffered special damage as a result of the alleged slander of title, then you should render your verdict in favor of the plaintiff TXO and against any such defendants.

Carrol v. Warner Bros. Pictures, 20 F.Supp. 405, 408 (So. Dist. NY 1937); International Visible Systems Corp. v. Remington-Rand, Inc., 65 F.2d 540, 542 (6th Cir. 1933); Berryman v. Sinclair Prairie Oil Co., 164 F.2d 734, 737 (10th Cir. 1948); Restatement (Second) of Torts §§ 128 and 651 (4th Ed. 1971); Hubbard v. Scott, 85 Or. 1, 12-13, 166 P.33, 36 (1917).

OBJECTION—REFUSED—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: No. 4 is in my charge, really. Maybe not in those terms, though. And reasonable degree of certainty, I always thought that was for future damages.

MR. MILLER: Your Honor, I'll withdrawn No. 4.

[729] THE COURT: No. 5? I'm going to refuse this because you're saying attorney fees shouldn't be and I'm saying I think the state of the law says it is.

PLAINTIFF'S INSTRUCTION NO. 5

In considering whether the defendants have suffered any special damages, you should not consider any attorneys fees or costs they may have incurred in defending the declaratory judgment action as a "special damage". Attorneys fees are not special damages and therefore are not recoverable under a slander of title action.

Barquin v. Hall Oil Co., 28 Wyo. 164, 167, 201 P. 352, 354 (1921); City of Shrevesport v. Kahn, 194 La. 55, 67, 193 So. 461, 465 (1939).

OBJECTION—REFUSED—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: No. 6?
MR. BRUMFIELD: No objection.
THE COURT: Looks okay.

PLAINTIFF'S INSTRUCTION NO. 6

The Court instructs the jury that in order for the defendants to obtain any verdict against TXO they must prove by a preponderance of the evidence that the plaintiff TXO acted with malice when they obtained and recorded the quit claim deed. There is no presumption of malice and the burden rests upon the defendants to prove lack of good faith. Malice is defined as an act or acts [730] undertaken with a direct intention to injure another party, or in a reckless disregard of the other

parties' rights and as a consequence of which the other party is injured.

Briggs v. Coykendall, 57 N.D. 785, 790, 224 N.W. 202, 205 (1929); Allison v. Berry, 316 Il. App. 261, 272, 44 N.E.2d 929 (1937).

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: No. 7? That will be refused. You're claiming actual malice and I'm relying on the Wells case which indicates to me that it just has to be malice rather than actual malice.

PLAINTIFF'S INSTRUCTION NO. 7

The defendants are not entitled to receive an award of punitive damage unless you the jury find, by a preponderance of the evidence, that the plaintiff TXO acted with "actual malice" in the recording of the quit claim deed and the filing of a declaratory judgment action.

Actual malice means ill will, spite, evil motive or such reckless disregard for the rights of others as to amount to a wilful or wanton act of harm. In other words, you must believe by a preponderance of the evidence that the plaintiff TXO acted with positive desire and intention to annoy and injure the property rights, if any, of the defendants before you can award any punitive damages.

Kidd v. Hossett, 331 S.W.2d 515, 518 (Tex. Civ. App. 1960); [731] Walker v. Ruggles, 540 S.W.2d 470, 474 (Tex. Civ. App. 1976) rev'd on other grounds, 632 S.W.2d 145 (1982); Proctor v. Gissendaner, 579 F.2d 876, 833 (5th Cir. 1978); Kidd v. Burten, 407 F.2d 204, 207 (6th Cir. 1969).

OBJECTION—REFUSED—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: No. 8? No. 8?

MR. BRUMFIELD: We object to 8 for the same reason—it states actual malice.

THE COURT: I see. That's refused.

PLAINTIFF'S INSTRUCTION No. 8

The Court instructs the jury that a party acting in good faith reliance upon the advice of their attorneys may be a defense to a slander of title action. You are further instructed that in consideration of the punitive damage claim by the defendants, that if you believe by a preponderance of the evidence that the plaintiff TXO acted in good faith upon the reliance of counsel then they could not, as a matter of law, have acted with actual malice and you should return your verdict with respect to the issue of punitive damages in favor of the plaintiff TXO and against the defendants.

Kidd v. Burten, 407 F.2d 204, 207 (6th Cir. 1969).

OBJECTION—REFUSED—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: No. 9?

[732] MR. BRUMFIELD: No objection.

PLAINTIFF'S INSTRUCTION NO. 9

The Court instructs you that the burden of proof in this case is upon the defendants. In other words, unless you believe that the defendants have proven by a preponderance of the evidence each and every element of their claim, then you should not render a judgment in favor of the defendants, but should render your verdict in favor of the plaintiff TXO.

To find something by a preponderance of the evidence means to find, based upon the evidence presented to you, that something is more likely so than not so.

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: No. 10?

MR. BRUMFIELD: No objection.

THE COURT: Is okay.

PLAINTIFF'S INSTRUCTION NO. 10

Under West Virginia law, any party to a contract or a dispute may file a law suit called a declaratory judgment law suit to ask that a court of law adjudicate the dispute and tell the parties who, for example, is correct and who is wrong.

The Court instructs the jury that the spirit and purpose of the declaratory judgment act (W. Va. Code § 55-13-1 *et. seq.*) is to anticipate the actual accrual of causes for equitable relief [733] or rights of action, by anticipatory orders which adjudicate real controversies before violation or breach results in loss to one or the other of the persons involved.

Therefore, if you believe from a preponderance of the evidence that TXO in good faith believed the Tug Fork—Signaigo deed was ambiguous as to oil and gas ownership and reservation and that the acquisition of the quit claim deed and filing of the declaratory judgment action against Tug Fork and the other defendants was intended to clear title and determine and adjudicate the parties' rights, responsibilities and duties as to such title, then TXO was warranted in its action and you should find for TXO and against the defendants.

West Virginia—Pittsburgh Coal Co. v. Strong, 129 W.Va. 832, 42 S.E.2d 46 (1974); Board of Educ. v. Board of Public Works, 144 W. Va. 593, 109 S.E.2d 552 (1959); Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 883 (1960).

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: To recapitulate for the plaintiff's instructions, I'm going to give No. 1, No. 2, No. 6, No. 9 and No. 10.

I took the liberty last night to take it upon my own to work out a punitive damage instruction. I wasn't so sure we had done enough in that area since I was going to let it go to the jury. I want you to look at this, both sides, and see if maybe that's not needed and if you tell me it's not, I'll agree [734] with you. If you tell me it is, I will agree with you. But it just seemed to be lacking with what we've got.

MR. BRUMFIELD: Judge, from the standpoint of the defendants, we like the language of the instructions and it does follow—We also note the Court is correct about it and there is one phrase that we have a problem with and—

THE COURT: I won't change anything. I want to give it as it is because I think the Supreme Court didn't say it wasn't bad, so that means it's good. So if you're objecting to it, and, you know, I'm not trying to push it on you. I don't want you to pacify me and say, Judge, oh, it's beautiful language. It's not my instruction. Somebody-else did that.

MR. BRUMFIELD: We object to it.

THE COURT: Okay. Well, it just won't be given.

MR. MILLER: Your Honor, I'd like to, if you will permit me to, offer it as a Plaintiff's Instruction. No. 11.

THE COURT: I'll give it over their objection if you offer it.

THE COURT: All right.

MR. WATSON: Your Honor, we'd like to state the basis of our objection.

THE COURT: Go ahead and put your objection on the record.

MR. WATSON: Your Honor, the language to which we had some reservation is that language that states that there's a reasonable [735] proportion requirement and it's our understanding that under the case of Wells

versus Smith that that is contrary to that portion of the instruction. I realize that Berry is a later case than the Wells case is and I don't know what's happened.

THE COURT: Well, your objection is noted.

Will you write on here Plaintiff's No. 11 for me?

MR. MILLER: Yes, Your Honor.

Thereupon it was agreed that each side would have 45 minutes for arguments.

MR. MILLER: Your Honor, if I can, I'm going to ask to modify the language.

THE COURT: It won't be given. Let's just not give it.

MR. MILLER: All right. We'll just drop it then?

THE COURT: Right. Did you hear what's taken place? This is not given now. He wanted to modify the language and I wasn't going to allow that. So it's not given at all.

All right. Bring the jury out.

Thereupon at 11:03 a.m. the jury came into the court room and the proceedings were before the Court and the jury as follows:

THE COURT: Okay. It's almost eleven o'clock. Maybe it is eleven o'clock. I'll let you go to lunch. Be back at 12:15 in the jury room 12:15 today. You're still not to discuss this case among yourselves or with anyone else. You're not to read, [736] view or listen to any news accounts of this case, if there be any. When you return from lunch, do not linger downstairs but just come up and go directly into the jury room and we'll call you out. Have a nice lunch.

Thereupon at 11:04 a.m. the jury left for lunch and there was a recess from the proceedings until 12:15 p.m.

The proceedings continued before the Court as follows:

THE COURT: Mr. Watson, did you have a statement to make?

MR. WATSON: Your Honor, the defendants would like to withdraw an instruction offered as Defendant's

Instruction No. 6 and substitute therefor Instruction 6A on punitive damages, which we think is a more complete instruction.

THE COURT: Any objection?

MR. MILLER: Your Honor, my objection would be in paragraph No. 1 the use of the phrase outrageous conduct and in paragraph No. 3, it makes reference to the wealth of the perpetrator. I believe those terms would inflame the jury and would mislead the jury and therefore we object to the instruction.

MR. BRUMFIELD: We'll withdraw outrageous in the first paragraph if you want.

THE COURT: All right. It will be given over his objection with the amendment of outrageous being stricken.

DEFENDANT'S INSTRUCTION No. 6A

[737] In addition to actual or compensatory damages, the law permits the jury, under certain circumstances, to make an award of punitive damages, in order to punish the wrongdoer for his misconduct, to serve as an example or warning to others not to engage in such conduct and to provide additional compensation for the conduct to which the injured parties have been subjected.

If you find from a preponderance of the evidence that TXO Production Corp. is guilty of wanton, wilful, malicious or reckless conduct which shows an indifference to the right of others, then you may make an award of punitive damages in this case.

In assessing punitive damages, if any, you should take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such punishment is to deter TXO Production Corp. and others from committing like offenses in the future. Therefore the law recognizes that to in fact deter

such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.

Leach v. Biscayne Oil and Gas Co., Inc., 289 S.E.2d 197 [738] (W.Va. 1982); Harless v. First National Bank in Fairmont, 289 S.E.2d 692 (W.Va. 1982); Wells v. Smith, 297 S.E.2d 872 (W.Va. 1982).

OBJECTION—GIVEN—EXCEPTION

/s/ Booker T. Stephens, Judge

Whereupon at 11:02 a.m. a recess was taken until 12:15 p.m. of the same day.

AFTERNOON SESSION

The trial was resumed at 12:15 p.m. pursuant to the noon recess, there being present the same parties as heretofore noted.

The proceedings continued before the Court and the jury after the jury had returned into the court room as follows:

THE COURT: Ladies and gentlemen of the jury, we're now at the stage of these proceedings whereby I will instruct you on the law as it applies to this case and I ask that you pay close attention as I do so.

It is your duty as jurors to follow the law as stated in my instructions and to apply the rules of law to the facts as you find them from the evidence in this case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty [739] to base a verdict upon any other view of the law than that given in the instructions of the Court, just as it would be

a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in this case.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the counterclaim of the defendants and the defenses raised by the answer of the plaintiff. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice or public opinion.

Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences. This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life. The law is no respecter of persons and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

Although the burden is on the party who asserts the affirmative of an issue to prove their claim by a preponderance of the evidence in the case, this rules does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

[740] To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your mind a belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proven by a preponderance of the evidence in the case, you may consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence regardless of who may have produced them. The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence; but which witnesses and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The functions of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So while you should consider only the evidence in the case, [741] you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence—such as the testimony of an eye witness. The other is indirect or circumstantial evidence—proof of a chain of circumstances pointing to the existence or nonexistence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, all exhibits received in evidence and the stipulations of counsel.

If any references by the Court or by counsel to matters of evidence do not coincide with your recollection, it is

your recollection which should control during your deliberations.

So, again, you are to consider only the evidence in the case. But in your consideration of the evidence, you are not [742] limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as witnesses testify. You are permitted to draw, from the facts which you find have been proven, such reasonable inferences as you feel are justified in the light of experience and common sense.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been otherwise established by the evidence in the case.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witnesses (sic) intelligence, motive and state of mind and demeanor and manner while on the stand. Consider the witnesses (sic) ability to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of these matters. Consider also any relationship which each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. It is your duty to determine from all of the testimony taken, and all of the circumstances surrounding this case, which witnesses [743] have testified truthfully and which ones, if any, have testified falsely. Certainly the Court does not mean to infer or suggest that any witness who has appeared before you has testified falsely or untruthfully. However, it will be a matter for you to determine which testimony is more satisfactory to you, and naturally, you may take into

consideration the opportunity of each witness to observe and to know the facts concerning which his or her testimony was given.

However, if you believe that any witness has knowingly and intentionally testified falsely as to any material fact, you have the right to disregard all of the testimony of such witness so testifying falsely, or to give his or her testimony, or any part thereof, such weight only as the same, in your opinion, may be entitled to receive.

Inconsistencies or discrepancies in the testimony of a witness or between or among the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently—an innocent misrecollection like failure of recollection is not an uncommon experience. So in weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood.

Expert witnesses. The rules of evidence provide that if [744] scientific, technical or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received into evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard that opinion entirely. On the other hand, if you should decide that an expert's opinion is based upon sufficient education or experience, then you may accept the opinion totally, or some part of it.

The Court instructs the jury that in considering and weighing the testimony of experts in this case, it is your duty also to consider and weigh the same in connection with all the other evidence in the case and all facts and circumstances established by the preponderance of the evidence, and you should apply sound judgment to the sifting and weighing of the evidence in order to reach a verdict.

In answering all questions in the verdict, if you find, after discussing the testimony and all other evidence which bears [745] upon a particular question, that the evidence is uncertain or inadequate to the point where you have to guess what the answer should be, then the party having the burden of proof as to the question or questions has not met the required burden of proof. Answers may not be based on guesswork or speculation. Your answers must be based upon evidence that you believe, evidence from which you can conclude or infer the existence of the facts which the party must prove in order to satisfy the burden of proof as to the question under consideration.

The same rules apply to the damage questions in the verdict. The party asking for damages has the burden of producing evidence by a preponderance of the evidence that the damages being alleged have been suffered.

Damages may not be based upon guesswork or speculation, but rather must be supported by evidence which satisfies your minds that the damages being awarded represent just and reasonable compensation for the particular item of damage under consideration.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the [746] evidence in the case with your fellow jurors.

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[783] THE COURT: Ladies and gentlemen of the jury, we're now at the stage of these proceedings whereby you will retire to the jury room and begin your deliberations on your verdict. The very first thing you do when you retire to the jury room is to choose one of you as the foreman of the jury. The very first thing you do when you retire to the jury room, before you do anything else, is to choose one of you as the foreman of the jury. After you have chosen a foreman of the jury, then you will have open and free discussion and deliberation on your verdict. We have form verdicts that we will provide to you. You can either find for the defendants and on the defendants' verdict, they're listed one, two, three and out from their name is a dollar sign and a line. You will have to fill that in. That is if you find for the defendants. Also, there is a section on here for punitive damages. That's your decision, to either find punitive damages or not to find punitive damages. If you find punitive damages, there's a dollar sign there. You must fill in that blank. There's also a verdict form here whereby you can find for [784] the plaintiff and against the defendants.

Now, after you have reached your verdict, at the bottom of the verdict form is a line and under that line is the word, foreperson. Whoever is chosen as the foreperson of the jury and I had mentioned foreman of the jury. That means the same thing. Whoever is the foreperson of the jury will sign the verdict form that all of you agree on. Then you will knock on the door and I will bring you out and announce what your verdict is. Now, if I don't hear you knock on the door, you will be in that room throughout eternity.

Now, you may retire and begin your deliberation.

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